Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1995

GULF COAST INDUSTRIAL WORKERS UNION,

Petitioner,

v.

EXXON CHEMICAL AMERICAS,

Respondent.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the rule of law first announced by this Court in the *Steelworkers Trilogy – United Steelworkers of America v. American Manufacturing Co.*, 363 U.S. 564, 80 S.Ct. 1358 (1960); *United Steelworkers of America v. Warrior and Gulf Navigation, Co.*, 363 U.S. 574, 80 S.Ct. 1347 (1960); and *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 80 S.Ct. 1347 (1960) – and reaffirmed by *United Paperworkers International Union v. Misco, Inc.*, 484 U.S. 29, 108 S.Ct. 364, 98 L.Ed.2d 286 (1987) regarding the scope of judicial review of arbitration awards is still viable?

2. Whether this Court should address the division among the United States Courts of Appeals regarding the application of the *Misco* case to the issue of judicial review of arbitration awards?

3. Whether the Fifth Circuit Court of Appeals failed to properly apply the holding in *Misco* when it ruled that the arbitrator exceeded his jurisdiction by reinstating the grievant to a non-safety position with his employer?

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OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit was issued *per curiam* and will not be published. (App. A., p. 1, n.). A copy of the court's opinion appears as App. A, *infra*, pp. 1 to 26.

JURISDICTION

The opinion of the United States Court of Appeals for the Fifth Circuit was entered on April 21, 1995. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONTRACTUAL PROVISIONS INVOLVED

The pertinent contractual provisions are set forth in App. B, *infra*, pp. 1 to 14.

STATEMENT

1. Background

This matter comes before the Court as the result of an arbitration award issued to the Gulf Coast Industrial Workers Union ("GCIWU"), and Exxon Chemical Americas ("Exxon") by Arbitrator John F. Caraway on December 15, 1993. (App. C, *infra*, pp. 1 to 38). The subject of the arbitration was the termination of an employee for a violation of the Alcohol and Drug Use Policy – the employee tested positive for alcohol. The arbitrator ordered reinstatement of the employee to a non-safety sensitive position without backpay. (App. C, p. 38).

Following receipt of the award, Exxon notified GCIWU that it did not intend to abide by the award. GCIWU filed suit to enforce in the United States District Court for the Southern District of Texas, Galveston Division, pursuant to 28 U.S.C. Section 185. Exxon filed a counter-claim seeking to vacate the award, charging that the arbitrator had exceeded his jurisdiction and that the award violated public policy.

The district court issued an order granting Exxon's counterclaim, vacating the award on September 21, 1994 (App. D., pp. 34-35), ruling that the arbitrator exceeded his jurisdiction by reinstating Mr. Paull. The district court did not reach the issue of public policy. (App. D, pp. 30-31). GCIWU perfected an appeal to the United States Court of Appeals for the Fifth Circuit pursuant to 28 U.S.C. 1291. The appellate court issued an opinion on April 21, 1995, affirming the ruling of the district court (App. A, pp. 25-26), also without reaching the issue of public policy. (App. A, p. 26).

2. Statement of Facts

GCIWU and Exxon are signatories to a collective bargaining agreement which provides for final and binding arbitration of disputes between the parties (App. B, p. 11). The agreement also provides that Exxon may discipline or discharge its union-represented employees for just cause. (Appendix B, pp. 11-12).

On December 1, 1922, Exxon terminated Russell Paull, an employee represented by GCIWU, for a violation of the drug and alcohol policy. Mr. Paull was ordered by his supervisor to submit to a for-cause alcohol test when he reported to work on November 22, 1992. The test revealed that Mr. Paull had a blood alcohol level of .043%. Under the policy, .04% is considered a positive test. Exxon terminated Mr. Paull, charging him with a violation of the Alcohol and Drug Use Policy. GCIWU grieved the discharge and the parties processed the dispute through the grievance and arbitration procedure contained in the contract.

At the arbitration hearing, Exxon and GCIWU stipulated that the dispute was properly before the arbitrator. After reviewing the documents the parties submitted as controlling on the issue to be decided, Arbitrator Caraway ruled that there was not just cause for discharge and reinstated Mr. Paull to a non-safety position. No backpay was awarded. Exxon refused to abide by the award, thus prompting the enforcement action by the GCIWU.

REASONS FOR GRANTING THE WRIT

This matter is governed by this Court's ruling in *United Paperworkers International Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 108 S.Ct. 362, 98 L.Ed.2d 286 (1987). In *Misco*, the Court strongly affirmed the judicial deference to arbitration awards first announced in the *Steelworkers Trilogy – United Steelworkers of America v. American Manufacturing Co.*, 363 U.S. 564, 80 S.Ct. 1343, 4 L.Ed.2d 1403 (1960); *United Steelworkers of America v. Warrior and Gulf Navigation Co.*, 363 U.S. 574, 80 S.Ct. 1347, 4 L.Ed.2d 1409 (1960); and *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 80 S.Ct. 1358, 4 L.Ed.2d 1424 (1960). According to *Misco*, the courts must defer to an arbitrator's interpretation and application of the terms of a collective bargaining agreement "even though the parties may allege that the award rests on errors of fact or on misinterpretations of the contract." *Misco*, 484 U.S. at 37.

Misco further holds that with regard to the determination of the appropriate remedy, "courts have no

authority to disagree with [the arbitrator's] honest judgment in that respect." *Misco*, 484 U.S. at 37-38. Arbitrator Caraway did nothing more than exercise his legitimate authority to fashion an appropriate remedy after finding that just cause did not exist to discharge Mr. Paull.

Review by this Court is necessary to restore the integrity of the agreements negotiated between Exxon and the GCIWU and to afford recognition to the public policy of private resolution of labor disputes through the use of final and binding arbitration. The issue is simply this: is the rule of law first announced by this Court in the *Steelworkers Trilogy* thirty-five years ago and most recently reaffirmed in *Misco* still viable? If so, the decision of the Fifth Circuit is in error. Writ should be granted to correct that error and to achieve uniform application of federal law in the intermediate federal court system regarding the finality of arbitration awards.

ARGUMENT

1. The United States Court of Appeals for the Fifth Circuit has not properly applied the rule of law regarding the authority of an arbitrator to interpret and apply the terms of the agreements negotiated by the parties to a collective bargaining agreement.

The rulings by the lower courts in this matter ignore the directive of this Court in *Misco* that arbitration is the favored method for the resolution of disputes between labor and management:

> The reasons for insulating arbitral decisions from judicial review are grounded in the federal

> statutes regulating labor-management relations. These statutes reflect a decided preference for private settlement of labor disputes without the intervention of government.
>
> * * *
>
> Because the parties have contracted to have disputes settled by an arbitrator chosen by them rather than by a judge, it is the arbitrator's view of the facts and of the meaning of the contract that they have agreed to accept. Courts thus do not sit to hear claims of factual or legal error by an arbitrator as an appellate court does in reviewing decisions of lower courts.

In this matter the parties submitted to the arbitrator a number of stipulated exhibits which the parties believed to govern the issue the arbitrator was asked to resolve. That issue was: "Did the Company have just cause to discharge Mr. Paull effective December 1, 1992 for violation of the Company's Alcohol and Drug Use Policy? If not, what is the appropriate remedy?" (App. C, p. 9).

The parties provided to the arbitrator copies of the collective bargaining agreement, the Alcohol and Drug Use Policy, and the Alcohol and Controlled Substance Guidelines. These were the documents he was asked to interpret and apply to the facts of the case. (The pertinent portions of these documents are set forth in App. C, pp. 5-9).

Contrary to the stipulations the parties provided to the arbitrator, the Fifth Circuit determined that the only document which was pertinent was the collective bargaining agreement. (App. A, pp. 23-24). To arrive at this conclusion, the court first misstated the issue that was

presented to the arbitrator by the parties (the court phrased the question presented to the arbitrator thusly: "[w]hether just cause existed under the Contract to discipline Grievant? If not, what is the appropriate remedy?"). (App. A, p. 6). In fact, the parties had submitted the issue of whether the grievant's conduct had violated the Alcohol and Drug Use Policy and, if not what was the appropriate remedy. (App. C, p. 9).

The Fifth Circuit then made the unwarranted assumption that the Alcohol and Drug Use Policy was merely a policy instituted by Exxon which it could choose to follow or to ignore rather than a document whose terms had been bargained by the parties and which modified the terms of the contract. (App. A, pp. 24-25). Instead, the court held that Schedule C and Article Twenty-six of the collective bargaining agreement were the sole sources of the arbitrator's authority. In any event, once the parties had stipulated to the applicability of the provisions of the Alcohol and Drug Use Policy in its submission to the arbitrator, the court is not entitled to dismiss it as of no consequence to the arbitrator's award.

Finally, even assuming that it was only the Schedule C offense and not the terms of the Alcohol and Drug Use Policy which was applicable to this dispute, the Fifth Circuit disregarded the bargaining relationship of the parties during which the identical contract language concerning just cause and Schedule C offenses listed therein had been interpreted by other arbitrators on two previous occasions. In each case, to arbitrator interpreted the contract language to permit discipline less than discharge for the committed offense. Neither of those awards was challenged by either party. In essence, what the Fifth Circuit

has done is to rewrite the provisions bargained for by the parties in pursuit of its own goal of encroaching upon the authority of arbitrators to aid labor and management in the peaceful, non-judicial settlement of their disputes.

2. The rule of law the Fifth Circuit has proposed regarding the authority of an arbitrator to interpret and apply provisions negotiated by the parties is not followed by other circuits.

The invasion of the arbitrator's authority by the Fifth Circuit in this case is not supported by decisions in other circuits. Rather, the *Misco* rule of judicial deference to an arbitrator's award absent compelling misconduct on the part of the arbitrator is the standard. *See Labor Rel. Div. of Const. v. Intern. Bro. Local 379*, 29 F.3d 742, 747 (1st Cir. 1994) ("Absent a *strong* implication that an arbitrator exceeded his or her authority, the arbitrator is presumed to have based his or her award on proper grounds.") (emphasis added); *United Food & Commercial Workers, Local No. 222 v. Iowa Beef Processors, Inc.*, 683 F.2d 283, 285 (8th Cir.), *cert. denied*, 459 U.S. 1088, 103 S.Ct. 571, 74 L.Ed.2d 933 (1982) ("[An arbitrator's] interpretation of the literal language of the disputed provision . . . obviously draws its essence from the collective bargaining agreement."); *Crafts Precision Ind. v. Lodge No. 1836*, 889 F.2d 1184 (1st Cir. 1989) (award of reinstatement upheld where arbitrator interpreted the shop rule as not *always* requiring discharge for a violation); *Bruce Hardwood Floors v. So. Coun. of Ind. Workers*, 8 F.3d 1104, 1108 (6th Cir. 1993) ("Whether the arbitrator's reading of the agreement was strained or even seriously flawed, and whether the district court's *per se* just cause analysis is

more plausible is irrelevant.") (compare to applicable language herein provided that violation of the stated rules *may* result in discharge – App. C, at C-7); *Champion Boxed Beef Co. v. Local 7*, 146 LRRM 2339 (10th Cir. 1994) ("But we do recognize that a court may not overrule the arbitrator's factual findings or contract interpretations because we disagree with them.").

See also, language of Article Twenty-Six B of the collective bargaining agreement (App. B, p. 12): "The commission of the offenses in Schedule C shall be just cause to render an employee *liable* to discharge on first offense"; and the language of the Alcohol and Drug Use Policy (App. C, p. 8): "A positive test result or refusal to submit to testing is grounds for disciplinary action, *including* termination of employment." Clearly, the arbitrator's interpretation of these provisions does not exceed the authority vested in him by the parties.

Moreover, an arbitrator's authority is established not only by the collective bargaining agreement, but also by the submission from the parties. *Laroque v. R.W.F., Inc.*, 8 F.3rd 95, 96 (1st Cir. 1993). In the instant matter the parties submitted to the arbitrator the issue of whether there was just cause to discharge the grievant for a violation of the Alcohol and Drug Use Policy and, if not, what would be the appropriate remedy, along with numerous stipulated facts and exhibits. It is this submission, in conjunction with the collective bargaining agreement which defined the authority of the arbitrator. He acted within that authority when he rendered his award.

In *Mobil Oil Corp. v. Independent Oil Workers Union*, 679 F.2d 299, 302 (3rd Cir. 1982), the court held:

> First, plenary review of arbitration submissions undermines the congressional policy in favor of expeditious and relatively inexpensive means of settling grievances, and thus of promoting labor peace. Second, a failure to defer to the arbitrator's interpretation of the submission would in some cases be inconsistent with deference to the arbitrator's interpretation of the agreement. This is so because a collective bargaining agreement merely constitutes a promise to arbitrate . . . and once the parties have gone beyond their promise to arbitrate and have supplemented the agreement by defining the issue to be submitted to an arbitrator, courts must look both to the contract and to the submission to determine his authority. . . .

(Cites omitted.)

See High Concrete Structures, Inc. v. Local 166, 879 F.2d 1215, 1219 (3rd Cir. 1989) where the arbitrator, based upon the submission by the parties, considered a memorandum outside of the collective bargaining agreement in reaching his decision; the court deferred to his interpretation of the issue to be resolved.

A review of the contract language involved, including the express terms of schedule C (App. B, p. 12) and the Alcohol and Drug Use Policy (App. C, pp. 7-9) demonstrates that the arbitrator acted within his authority when he determined that just cause did not exist for *termination* and that the appropriate remedy was reinstatement to a non-safety position. *See Super Tire Eng. v. Teamsters Local Union No. 676*, 721 F.2d 121, 124 (3rd Cir. 1983) ("The award draws its essence from the agreement and must be upheld 'if the interpretation can in any

rational way be derived from the agreement, viewed in the light of its language, its context and any other indicia of the parties' intention. . . . ' ") (cites omitted). In contrast to the instant case, the cases cited by the Fifth Circuit to support its decision did not contain "any other indicia of the parties' intention" to establish the authority of the arbitrator.

See United States Steelworkers of America v. Enterprise Wheel and Car Corp., supra, 363 U.S. 597:

> As we there emphasized, the question of interpretation of the collective bargaining agreement is a question for the arbitrator. It is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns the construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his.

CONCLUSION

The Court should review this case because the decision of the lower court undermines the long-established public policy favoring the peaceful resolution of labor disputes through the use of final and binding arbitration. The decision of the Fifth Circuit is not consistent with this Court's ruling in *Misco* regarding the proper authority of the chosen arbitrator of the parties to interpret the negotiated agreements placed before him. The Court should also review this case because of the conflicts between the federal circuit courts of appeal as to the appropriate standard to be applied to the issue of the arbitrator's authority to interpret the provisions of a contract.

For these reasons the Court should grant certiorari.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

No. 94-60716

Summary Calendar

GULF COAST INDUSTRIAL WORKERS UNION,

Plaintiff-Counter
Defendant-Appellant,

versus

EXXON CHEMICAL AMERICAS,

Defendant-Counter
Claimant-Appellee.

Appeal from the United States District Court
for the Southern District of Texas

(CA-G-94-69)

Before SMITH, EMILIO M. GARZA, and PARKER, Circuit Judges.

PER CURIAM:*

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* Local Rule 47.5 provides:
"The publication of opinion that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession."
Pursuant to that Rule, the Court has determined that this opinion should not be published.

The plaintiff appeals the district court's summary judgment in favor of the defendant. The district court held that the arbitration award the plaintiff sought to enforce had to be vacated because the arbitrator had exceeded his authority under the collective bargaining agreement. We affirm.

I. FACTS

Gulf Coast Industrial Workers Union (Union), a labor organization, filed suit against Exxon Chemicals (*sic*) Americas (Exxon), the operator of a chemical facility, alleging that Exxon had materially breached their collective bargaining agreement (CBA) by refusing to comply with an arbitration award ordering Exxon to reinstate its former employee, Russell Paull, to full employment at the chemical facility.

Paull was employed by Exxon as a process technician in January 1987. On November 22, 1992, Paull was scheduled to "slide"[1] to the position of First-Line Supervisor in the Chemical Extraction area during the evening shift. Paull arrived at the plant at approximately 6:00 p.m. and reported to Mr. Watts, whom he was to relieve from his supervisory duties. Watts advised Paull that he detected the smell of alcohol on Paull and that reasonable cause existed for an alcohol test under the company's Alcohol and Drug Use Policy. Paull explained that he had consumed a few bottles of non-alcoholic beer prior to coming

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[1] "Sliding" is a process whereby a wage employee assumes supervisory responsibilities on a temporary basis. R. 2, 164.

to work. However, Watts insisted that Paull undergo testing.

The plant superintendent was advised of the situation and advised Paull that the alcohol test was required. Paull continued to insist that the smell was due to his consumption of non-alcoholic beer. Paull was taken by Watts and a union representative to the hospital where a blood sample was obtained. The test revealed a blood alcohol content of .043%. A blood alcohol level of .04% is considered a positive test result under Exxon's Alcohol and Drug Policy.

After being informed of the positive test results, Paull admitted for the first time that he had consumed four bottles of regular beer prior to coming to work. Paull was terminated by Exxon as a result of the violation of the Alcohol and Drug Policy.

The Union filed a grievance in which it asserted that Paull was subjected to an unjust termination. The Union by-passed the steps of the grievance procedure and advised Exxon of its intent to arbitrate the dispute in accord with the terms of the CBA. The question presented to the arbitrator was: "[w]hether just cause existed under the Contract to discipline Grievant? If not, what is the appropriate remedy?"

The following pertinent provisions were contained in the CBA and other policy documents of Exxon dealing with alcohol use by employees. Article Fifteen of the CBA between the parties provides:

> The Arbitrator shall have the authority only to interpret and apply the provisions of this agreement and shall not have authority to alter or

> add to it in any way. The decision of the arbitrator shall be final and binding on the Company and the Union for the duration of this agreement.

Article Twenty-Six (B) of the CBA provides: "[t]he Company shall have the right to discipline and discharge employees for just cause. The commission of the offenses listed in Schedule C [of the CBA] shall be just cause to render an employee liable to discharge on first offense." The Schedule C offenses for which an employee may be discharged without notice include: "[i]ntroduction, possession, or use of intoxicating liquors on the property of the Company, or proceeding to work under the influence of liquor."

Also submitted to the arbitrator was Exxon's Statement of Policy regarding employees' use of alcohol and drugs, which included the following provisions:

> Being unfit for work because of the use of drugs or alcohol is strictly prohibited and is grounds for termination of employment.
>
> . . .
>
> The Corporation may also require employees to submit to medical evaluation or alcohol or drug testing where cause exists to suspect alcohol or drug use. . . . A positive test result or refusal to submit to a drug or alcohol test is grounds for disciplinary action, including termination.

The Baytown Chemical Plant issued the following pertinent guidelines regarding alcohol and drug use:

> An employee must not report to work mentally or physically unfit for work due to the consumption of alcohol or controlled substances.

> Being mentally or physically unfit for work because of the effects of alcohol or controlled substances while on the premises of the Exxon Chemical Americas' Baytown Chemical Plant is cause for termination of employment.
>
> The Working Rules for employees provide:
>
> DISMISSAL, SUMMARY
>
> Following is the list of offense (*sic*) for which an employee may be discharged without notice.
>
> . . .
>
> 12. Introducing, possessing, or being under the influence of narcotics, dangerous drugs, or intoxicants, such as alcoholic beverages and certain drugs, while in the plants. Reporting to work mentally and physically unfit.

Paull signed documents acknowledging that he was aware of these policies. The arbitrator determined that Paull was aware of Exxon's policy prohibiting an employee from being under the influence of alcohol in the work place and that a positive test for alcohol consumption could result in his termination. The arbitrator also stated that the parties had stipulated that Paull's test results showed a blood alcohol concentration that exceeded the prohibited blood alcohol concentration. The arbitrator concluded that Paull had violated Exxon's Alcohol and Drug Use Policy and the Alcohol Use Guidelines.

However, the arbitrator further determined that these policies do not require termination as the only remedy that can be ordered. The arbitrator relied on language in the policies providing that "appropriate disciplinary

action will be taken," and indicating that disciplinary action included termination. The arbitrator noted that Paull had no prior disciplinary violations and had a good work record. The arbitrator ordered that Paull be reinstated to full employment with restored lost seniority, but not to a safety-sensitive position. The arbitrator did not grant Paull backpay.

The Union files suit because Exxon refused to comply with the arbitration award. Exxon answered the complaint and filed a counterclaim, arguing that the arbitrator exceeded his authority by ordering Paull's reinstatement. The parties filed cross-motions for summary judgment in the district court.

The district court determined that the arbitrator had exceeded his authority because the CBA established that proceeding to work under the influence of alcohol establishes just cause for discharging an employee. The district court also determined that the arbitrator had implicitly found "just cause" for the discharge. The district court did not reach the issue whether the arbitrator's decision violated the public policy mandating employers to provide a drug and alcohol-free workplace. The district court denied the plaintiff's motion for summary judgment, granted Exxon's motion, and dismissed the Union's complaint.

II. DISCUSSION

The Union argues that the district court did not have the authority to vacate the arbitrator's award if the arbitrator's decision drew "its essence from the collective

bargaining agreement," even if the arbitrator misconstrued the contract. The Union further argues that Exxon advised the arbitrator that the basis for Paull's discharge was his violation of the Drug and Alcohol Policy, provided the arbitrator with documentation of the policy, and advised the arbitrator that such policy was to be read in conjunction with the CBA. The Union contends that the policy documents provided for a varied range of disciplinary action, including termination and, thus, that the arbitrator acted in accord with what the parties authorized him to do.

The Union also argues that Paull was not charged with a violation of Schedule C, but was specifically charged with a violation of the Drug and Alcohol Policy. The Union argues that the district court erred in finding that the arbitrator implicitly found just cause for the discharge because he explicitly found that there was not just cause based on the circumstances for discharge.

"An arbitrator's award will not be disturbed if his decision 'draws its essence from the collective bargaining agreement,' and is not based on the arbitrator's 'own brand of industrial justice.' " *E.I. DuPont de Nemours and Co. v. Local 900 of Intern. Chemical Workers Union*, 968 F.2d 456, 458 (5th Cir. 1992) (citation omitted). However, the court may "scrutinize the award to ensure that the arbitrator acted in conformity with the jurisdictional prerequisites of the collective bargaining agreement." *Id.* (internal quotation and citation omitted). The district court may vacate an arbitrator's award if it finds that the arbitrator exceeded its arbitral authority provided for in the agreement. *Id.* This court reviews the district court's

ruling that an arbitration award was not grounded in the agreement de novo. *Id.*

The Union argues that other arbitrators who have considered the same contract provisions involved herein determined that the commission of a schedule C offense does not necessarily mandate discharge. *See Exxon Chemical Americas and Gulf Coast Industrial Workers Union,* FMCS No. 89-22792 at 12-13 (Feb. 12, 1990) (finding that the violation of any Schedule C offenses listed in the CBA does not automatically establish just cause for discharge); *Exxon Chemical Americas Baytown Chemical Plant and Gulf Coast Industrial Workers Union,* FMCS No. 94-01858 at 11 n.1 (Nov. 2, 1994) (arbitrator's authority under the Exxon/Gulf Coast CBA includes the right to review the penalty imposed and not merely a determination whether an offense has been committed).

Contrary to these arbitration decisions, this court has determined that an arbitrator who is restricted by the CBA to determining: whether "just cause" exists for discharge and to formulating a remedy only in the event that no just cause is found, is not authorized to impose a less drastic penalty on an employee if a violation has been found to have occurred. In *DuPont,* the issue presented to the arbitrator was the same issue presented herein. 968 F.2d at 459. "Were the Grievants discharged for just cause under the contract? If not, what is the appropriate remedy?" *Id.* The arbitrator determined that the employees used marijuana while on the company premises although they were aware that it was grounds for discharge. *Id.* at 458.

Although the arbitrator implicitly found a rule violation constituting just cause for termination, he fashioned a remedy other than discharge. *Id. DuPont* construed the question presented to the arbitrator as authorizing him to fashion a remedy only in the event that the grievants were discharged without just cause and determined that the arbitrator had exceeded his authority. *Id.* at 459.

In *Container Products, Inc. v. United Steelworkers of America and its Local 5651*, 873 F.2d 818 (5th Cir. 1989), the arbitrator made an implicit finding of just cause for dismissal but ordered reinstatement of the employee. The CBA specifically stated that the arbitrator would not have jurisdiction to modify the degree of discipline imposed by the company if the arbitrator determined the employee was discharged for proper cause. *Id.* at 818-19. The court affirmed the district court's order vacating the award based on the finding that the arbitrator had exceeded his authority.

In *Delta Queen Steamboat Co. v. District 2 Marine Engineers Beneficial Ass'n.*, 889 F.2d 599, 601 (5th Cir. 1989), *cert. denied*, 498 U.S. 853 (1990), the arbitrator reinstated a ship captain although he found that the captain was guilty of gross carelessness in violation of company rules. The company relied on a provision in the CBA providing that the "right to discipline and discharge for proper cause are [sic] . . . the sole responsibility of the Company." *Id.* The court found that the agreement proscribed the arbitrator from reinstating the discharged employee. *Id.* at 604.

The Union argues in its reply brief that, in a more recent case, the court upheld the arbitrator's fashioning a

remedy although the CBA provided that an employee who tests positive "shall be subject to immediate discharge." *See Kerr-McGee Chemical Corp. v. United Steelworkers of Americas*, 800 F.Supp. 1405 (N.D. Miss. 1992), *aff'd*, 988 F.2d 1214 (5th Cir. 1993) (Table). The Union fails to point out that *Kerr-McGee* distinguished its holding from *DuPont*. *Id.* at 1410 n.7. In *Kerr-McGee*, the arbitrator determined that there was no just cause to fire the employee because of an ambiguity in the contract regarding the establishment of just cause. *Id.* In the absence of a finding of just cause, the arbitrator was clearly authorized to fashion a remedy. Thus, *Kerr-McGee* is not applicable herein.

The arbitrator found that Paull had violated Exxon's Alcohol and Drug Use Policy and Alcohol Use Guidelines because he tested positive for being under the influence of a prohibited amount of alcohol. Although the arbitrator did not specifically find that Paull's conduct constituted "just cause" for termination, the arbitrator's factual findings constitute an implicit finding that just cause existed for Paull's termination under the CBA. *See Container Products, Inc.*, 873 F.2d at 819 (the court may examine the record as a whole to determine if the arbitrator implicitly found the existence of just cause for dismissal).

Thus, the remaining issue is whether the arbitrator was authorized to fashion a different remedy despite having made a "just cause" finding. The CBA between the parties expressly states that the arbitrator "shall" have the authority only to interpret and apply the provisions of that agreement and "shall not have the authority to alter or add to it in any way." The CBA provides that Exxon "shall have the right to discipline and discharge

employees for just cause." These provisions, like those cited in the cases above, reserve to Exxon the right to discipline and discharge employees. Based upon these provisions, and the arbitrator's implicit finding of just cause, the arbitrator exceeded its authority in altering the disciplinary action taken against Paull.

The Union's argument that the arbitrator was authorized to fashion a remedy because Exxon's policies and guidelines on alcohol use do not mandate termination is without merit. "[W]hile an arbitrator's decision is accorded considerable judicial deference to the extent it touches the merits of the controversy, his jurisdiction nevertheless is shaped by the underlying collective bargaining agreement." *Delta Queen Steamboat Co.*, 889 F.2d at 602. "[The arbitrator] may look beyond the written contract when interpreting a collective bargaining agreement if the instrument is ambiguous or silent upon a precise question." *Id.* If the arbitrator "exceeds the express limitations of his contractual mandate, judicial deference is at an end." *Id.*

The arbitrator was not authorized to look beyond the CBA because that document expressly gave Exxon the right to discipline and discharge an employee for cause. Further, the mere fact that Exxon may have instituted policies which provide Exxon with the discretion to impose a less stringent penalty on its employees for certain conduct does not authorize the arbitrator to exercise that same discretion. *See Delta Queen Steamboat Co.*, 889 F.2d at 602 (arbitrator is not free to usurp the discretion delegated to the employer in the CBA). The district court did not err in determining that the arbitrator

exceeded his authority under the CBA in imposing a less drastic disciplinary penalty on Paull.

Exxon argues that the district court's decision can be affirmed on the alternative ground that the arbitrator violated public policy in reinstating Paull. Because it is clear that the arbitrator exceeded his contractual authority in reinstating Paull, this court need not address whether the reinstatement was a violation of clearly established public policy.

III. CONCLUSION

For the reasons given above, the judgment of the district court is AFFIRMED.

APPENDIX B

AGREEMENT

between

Exxon Chemical Americas
Baytown Chemical Plant

and

Gulf Coast
Industrial Workers Union

Effective April 15, 1991

COLLECTIVE BARGAINING AGREEMENT

STATE OF TEXAS
COUNTY OF HARRIS

THIS AGREEMENT is entered into by the following parties: Exxon Chemical Americas, a division of Exxon Chemical Company, hereinafter referred to as "Exxon Chemical Americas" or "Company"; and Gulf Coast Industrial Workers Union, hereinafter referred to as "Union."

WITNESSETH:

WHEREAS, subsequent to an election conducted by the National Labor Relations Board in Case No. 23-RC-2088, the Board issued a Certification of Representative dated July 18, 1963, in which it certified the Union as the bargaining representative for a Unit of Production and Maintenance employees as described in the Stipulation for Certification upon Consent Election entered into

in said case on July 9 and 10, 1963, reference being made to said Certification and Stipulation for all purposes; and

WHEREAS, pursuant to said Certification, Humble Oil & Refining Company recognized the Gulf Coast Industrial Workers Union as the exclusive bargaining representative of all employees at its Baytown Refinery in the Production and Maintenance Unit referred to above; and

WHEREAS, on June 1, 1966, Humble sold its Chemical Plant facilities located at its Baytown Refinery (known as the Baytown Chemical Plant) to Enjay Chemical Company and Enjay hired certain employees in the Production and Maintenance Unit who had been employed at such Baytown facilities by Humble prior to June 1, 1966; and

WHEREAS, on June 1, 1966, by agreement of Humble, Enjay, and the Union, a multiemployer bargaining unit was established; and

WHEREAS, on January 1, 1973, Humble Oil & Refining Company and Enjay Chemical Company merged into their parent Exxon Corporation and, at the same time, Humble became Exxon Company, U.S.A. (a division of Exxon Corporation) and Enjay became Exxon Chemical Company U.S.A. (an operating division of Exxon Chemical Company, a division of Exxon Corporation); and

WHEREAS, on May 8, 1980, Exxon, U.S.A., Exxon Chemical Americas (formerly Exxon Chemical, U.S.A.), and the Union agreed to discontinue the multiemployer bargaining unit and agreed to separate contracts;

WHEREAS, the Company and the Union desire to enter into an agreement for the purpose of collective bargaining concerning rates of pay, wages, hours of work, and other conditions of employment for the employees in the referred-to unit;

NOW, THEREFORE, it is agreed by and between the parties as follows:

Article One
COVERAGE

A. Exxon Chemical Americas recognizes the Union as the exclusive representative of its Production and Maintenance employees employed at its Baytown Chemical Plant facilities for the purpose of collective bargaining with respect to rates of pay, wages, hours of employment, and other conditions of employment.

* * *

Article Three
DURATION OF CONTRACT

A. This Agreement shall be effective April 15, 1991 and remain in force and effect through April 15, 1994 and for consecutive two-year periods thereafter unless terminated by either party by giving written notice not less than 60 nor more than 90 days in advance of termination of contract.

* * *

Article Four
FUNCTIONS OF MANAGEMENT

The Company shall retain all rights of management resulting from the ownership of its plant and facilities or pertaining to the operation of the business, except to the extent that such rights are limited by the provisions of this Agreement.

* * *

Article Fourteen
GRIEVANCE AND
GRIEVANCE PROCEDURE

A. A grievance is the situation which exists when an employee, a group of employees, or the Union feels injured, treated unfairly, or aggrieved because of the position taken by the Company or any member of management, in regard to a matter concerning wages, hours, working conditions, or any part of this Contract. The appropriate steward, upon notification of a grievance by an aggrieved employee or employees, shall have the right, with permission from the Steward's immediate supervisor, to investigate any conditions said by the aggrieved to have caused the grievance. In the event a grievance comes to the attention of the Union and the employee(s) affected elects not to pursue the matter, the appropriate Steward may process it in accordance with the regular procedure. All grievances that the Union may elect to process shall be in accordance with the following procedures:

* * *

Article Fifteen
ARBITRATION

If the grievance is not adjusted under the steps provided in Article Fourteen, and if it involves an alleged violation of a provision of this Agreement, then upon written demand by the Union the dispute may be referred within 30 days following the decision of the Manager, or his/her designated representative, to the arbitration procedure. Upon receipt of a written demand for arbitration, the Company and the Union shall meet to reduce to writing the question to be submitted to the Arbitrator. In the event the Union and the Company fail to agree upon the question to be submitted prior to the convening of the arbitration hearing, the Arbitrator shall decide the question at the beginning of the hearing.

* * *

The Arbitrator shall have the authority only to interpret and apply the provisions of this Agreement and shall not have the authority to alter or add to it in any way. The decision of the arbitrator shall be final and binding on the Company and the Union for the duration of this agreement.

Article Twenty-Six
DISCIPLINE AND DISCHARGE

A. The first year of continuous active service by an employee shall be considered as temporary, and termination of employment within that time may be made at the discretion of the Company.

B. The Company shall have the right to discipline and discharge employees for just cause. The commission of the offenses in Schedule C shall be just cause to render an employee liable to discharge on first offense. In the event of discharge, the Company will give the employee and, at his request, the Union a written statement giving the reason or reasons for the discharge.

* * *

SCHEDULE C

Following is the List of Offenses for Which an Employee May be Discharged Without Notice:

(I) Introduction, possession, or use of intoxicating liquors on the property of the Company, or proceeding to work under the influence of liquor.

ALCOHOL AND DRUG USE POLICY

* * *

III.B

Exxon may conduct unannounced searches for drugs and alcohol on owned or controlled property. The Corporation may also require employees to submit to medical evaluation or alcohol and drug testing where cause exists to suspect alcohol or drug use.

* * *

A positive test result or refusal to submit to a drug or alcohol test is grounds for disciplinary action, including termination.

ALCOHOL AND CONTROLLED SUBSTANCES GUIDELINES

* * *

The Company has the right to require employees to submit to medical evaluation or alcohol and drug testing where reasonable cause exists to suspect alcohol or controlled substance misuse. A positive test or refusal to submit to testing is grounds for disciplinary action, including termination of employment.

APPENDIX C

EXXON CHEMICAL AMERICAS,

-and-

GULF COAST INDUSTRIAL WORKERS UNION

RE: FMCS 93-05546

GR: RUSSELL R. PAULL
DISCHARGE
FILE NO.: 3448-JFC

APPEARANCES

FOR THE COMPANY:	Charles A. Casey and David B. Koretzky Attorneys
FOR THE UNION:	Sharon D. Groth General Counsel
ARBITRATOR:	John F. Caraway, selected from a panel of the Federal Mediation and Conciliation Service

The grievant, Mr. Paull, was discharged for violating the Company's Alcohol and Drug Use Policy. Mr. Paull was employed by the Company on January 22, 1987 as a Process Technician. The incident which lead (*sic*) to his termination occurred on November 22, 1992. On that date he was scheduled to "slide" to the position of First-Line Supervisor in the Chemical Extraction Area during the evening shift. It was a temporary assignment. Mr. Paull was scheduled to work from 6:00 p.m. on the evening of November 22 until 6:00 a.m. on the morning of November 23.

At approximately 6:00 p.m. on November 22, 1992 Mr. Paull arrived at work and entered the dining area where Mr. Watts, whom he was to relieve from the supervisory duties, was waiting for him. Mr. Watts detected the smell of alcohol. He confronted Mr. Paull with his belief. He stated he told Mr. Paull that under the Company's Alcohol and Drug Use Policy reasonable cause existed for an alcohol test. Mr. Paull told Mr. Watts that he had consumed a few bottles of non-alcohol beer prior to coming to work. Mr. Watts insisted the test proceed. Plant Superintendent Herrera was called to Mr. Watts' office and advised of the situation. Mr. Paull continued to insist that the smell of alcohol was due to his consumption of non-alcoholic beer. Mr. Herrera advised Mr. Paul that the alcohol test must be conducted. The grievant was taken together with Mr. Watts and a Union representative to a hospital where a blood sample was obtained. The grievant was then placed on Crisis Suspension pending the results of the alcohol test. [Joint Stipulation No. 16].

The alcohol test, a Gas Chromatography Mass Spectroscopy [hereinafter referred to as GC/MS] showed a blood alcohol content of .043%. The blood alcohol level of .04% is considered a positive test result under the Company's Alcohol and Drug Use Policy. [Joint Stipulation No. 13].

On December 1, 1992 the Company learned of the positive test results. Mr. Paull was informed of the results. He then admitted, for the first time, that he had consumed four (4) bottles of regular beer prior to reporting for work. As a result of Mr. Paull's violation of the

Alcohol and Drug Use Policy and Alcohol Use Guidelines, Mr. Paull was discharged effective December 1, 1992. [Joint Stipulation No. 17].

CONTRACT PROVISIONS INVOLVED

ARTICLE FOUR
FUNCTIONS OF MANAGEMENT

"The Company shall retain all rights of management resulting from the ownership of its plant and facilities or pertaining to the operation of the business, except to the extent that such rights are limited by the provisions of this agreement (Page 4)."

ARTICLE TWENTY
WORKING RULES

"As a means of directing the working force, directing and controlling the operations of the plant, and maintaining discipline and appropriate standards of both individual and group conduct, the Company will from time to time, as it deems advisable, publish Working Rules. The application of such rules shall not be in conflict with any provision of the this agreement. (Page 18)."

ARTICLE TWENTY-SIX
DISCIPLINE AND DISCHARGE

"B. The Company shall have the right to discipline and discharge employees for just cause. The commission of the offenses listed in Schedule C shall be just cause to render an employee liable to discharge on first offense. In the event of discharge, the Company will give the

employee and, at his request, the Union a written statement giving the reason or reasons for the discharge (Page 21)."

SCHEDULE C

"Following is the list of Offenses for which an Employee May be Discharged Without Notice:

(1) Introduction, possession, or use of intoxicating liquors on the property of the Company, or proceeding to work under the influence of liquor (Page 58)."

III. B.
ALCOHOL AND DRUG USE POLICY

"Exxon may conduct unannounced searches for drugs and alcohol on owned or controlled property. The Corporation may also require employees to submit to medical evaluation or alcohol and drug testing where cause exists to suspect alcohol or drug use.

* * *

A positive test result or refusal to submit to a drug or alcohol test is grounds for disciplinary action, including termination. [Joint Exhibit H]."

III. C.
ALCOHOL AND CONTROLLED
SUBSTANCE GUIDELINES

"The Company has the right to require employees to submit to medical evaluation or alcohol and drug testing where reasonable cause exists to suspect alcohol or controlled substance

misuse. A positive test result or refusal to submit to testing is grounds for disciplinary action, including termination of employment.

Reasonable cause exists when observable physical signs, behavior (e.g., including, but not limited to, difficulty in maintaining normal balance, poor coordination, slurred speech, smell of alcohol on breath), or an incident indicate an employee is unfit for work and/or there is reasonable cause to suspect the policy has been violated. [Joint Exhibit G]."

ISSUE

Did the Company have just cause to discharge Mr. Paull effective December 1, 1992 for violation of the Company's Alcohol and Drug Use Policy? If not, what is the appropriate remedy?

COMPANY ARGUMENT

The Company maintains that it had just cause to discharge the grievant. Mr. Paull knew the Company's rule regarding alcohol use, the requirement that he submit to an alcohol test, that a positive test could cause his termination. The facts show that on November 22, 1992 he violated the Company's Alcohol and Drug Use Policy and Alcohol Use Guidelines.

There is no question but that Mr. Paull knew the Company rules and policies regarding alcohol use. He acknowledged receipt of the Alcohol and Controlled Substance Guidelines on February 3, 1983. [Joint Exhibit No. D]. He received the 1987 Chemical Plant Alcohol and

Controlled Substance Guidelines. [Joint Exhibit No. F]. He knew of the Company's 1990 Alcohol and Drug Use Policy. [Joint Exhibit No. H].

There can be no doubt but that the Company had every right to require Mr. Paull to undergo an alcohol test on November 22, 1992. The Alcohol and Drug Use Policy is quite clear in this requirement. It reads:

> "The Corporation may also require employees to submit to medical evaluation or alcohol and drug testing where cause exists . . . " [Joint Exhibit No. H]."

The evidence showed that Mr. Watts smelled alcohol on Mr. Paull's breath. This created reasonable cause for the alcohol test to be conducted. It is not disputed that the alcohol test was done in a proper and acceptable manner. There is no question but that the test results showed .043%. The parties have stipulated that a blood alcohol concentration of .04% or greater is considered a positive test for alcohol under the Company's policy. [Joint Stipulation No. 13].

Not only did Mr. Paull test positive for alcohol consumption, but he also concealed his alcohol use from the Company. On two (2) occasions he stated that he had only consumed non-alcoholic beer. He lied to the Company. He finally changed his story and admitted his alcohol consumption. [Joint Exhibit No. O].

There can be no question but that Mr. Paull occupied a critical position by reason of his "sliding" to a designated position, being a temporary Supervisor. His duties were "safety sensitive". They included responsibility for the safe operation of the area. A negligent and impaired

performance of his functions could result in loss of life, damage to the environment, and damage to property.

The Company contends that when Mr. Paull reported to work at 6:00 p.m. his blood alcohol level, according to the testimony of Dr. Lerman, was between .08% and .03%. This is based on the time lapse of his reporting time of 6:00 p.m. and when the blood was drawn at 8:30 p.m. – a period of two and one-half hours (2½). Thus, his blood alcohol level was at least double that of the test result when he reported to work.

The Company maintains that it follows a policy of Positive Discipline. However, in the instant case, the Company has the right to decide the Positive Discipline Process may not apply where the infraction is so serious that it should not be followed. A violation of the Alcohol and Drug Use Policy and Alcohol Use Guidelines is such a serious offense, that termination is warranted without following the steps of the Positive Discipline Program.

The Company by a number of documents has shown beyond argument that it has an obligation to provide a drug and alcohol free work place. Being a Government contractor imposes an even greater responsibility upon the Company to discharge this responsibility.

The Company maintains that a series of Arbitration Awards involving the termination of employees at its facilities who are represented by this Union uphold the Company's position in the Paull case. Close analysis of all these cases demonstrates that the Company's action in terminating Mr. Paull is consistent with the decisions which it made in these prior arbitration cases.

UNION ARGUMENT

The Union shows that Mr. Paull has worked for the Company for over fourteen (14) years as a Process Technician. His record was exemplary. [Stipulated Exhibit No. P]. He has received several commendations for his work performance. He was rated an excellent employee in a number of areas in his last performance appraisal. The Supervisor commented "continues to demonstrate a high regard for safety".

During his career he has received a number of citations from the Company for excellent performance and his work on safety. Three (3) months prior to his termination the grievant was issued a Letter of Appreciation on August 31, 1992. In addition he filled in for Supervisors on a temporary basis.

The Union argues that a single violation of the terms of the Company's Alcohol and Drug Use Policy does not mandate termination. Termination is only the last resort. This is consistent with the Company's adopted policy of Progressive Discipline. The Company can not ignore the just cause concept as it did in this case.

The Company argues that termination is the only penalty that could be administered in the instant case. The Union maintains that this is not true. Prior arbitrations and legal authority were cited to show that an Arbitrator must consider all of the factors present in a case, particularly the mitigating elements. Arbitrator Helburn in a case between the parties [Thomas Woods case] stated that discharge should not automatically follow an infraction of the Company's Alcohol and Drug

Use Policy. He ruled that the policy did not mandate termination on a first offense.

The Union maintains that there is a question of doubt as to the accuracy of the alcohol test level administered to the grievant. The Company's witness, Dr. Lerman, stated that test results can vary by 0.015 to 0.012. This means that Mr. Paull's blood alcohol content could have been as low as 0.028, well under the cut off level of 0.04. Further, there is the consideration as from Dr. Lerman's testimony that different individuals metabolize alcohol differently. There was no effort made to determine what Mr. Paull's metabolic rate was.

Regarding the cases cited by the Company as precedent, the Union maintains that all of these cases can be distinguished from the Paull grievance.

The Union contends that the Company has published a Progressive Discipline Program yet it failed to follow that program in the case of Mr. Paull. Mr. Paull had never received any prior discipline for violation of Company work rules. The basis for the termination was purely and simply the violation of the Company Alcohol and Drug Use Policy.

The Union does not condone the use of drugs or alcohol nor deny that work in a chemical plant is potentially hazardous. It does demand that any testing policy adhere to the provisions of the Collective Bargaining Agreement and that summary dismissal not be imposed in each and every case of an alleged violation of the policy without due consideration of the circumstances.

DECISION

Certain facts in this case are not in dispute. There can be no question but that the Company has a strong and continuing responsibility to provide a work place free from drugs and alcohol. Judge Jere Williams in the recent case *GCIWU vs Exxon Company, U.S.A.*, case No. 91-6374 [Fifth Circuit, May 24, 1993] certiorari denied, made a thorough review of the statutes, regulations, judicial and judicial decisions on this responsibility. He stated:

> "There are countless statutes, regulations, Company guidelines and judicial decisions that pronounce the emphatic national desire to eradicate elicit (*sic*) drugs from the work place. Everyday legislators, agencies and courts reflect our intolerance of substance abusers and the astronomical cost – both human and financial – associated with their behavior."

Judge Williams quoted the following statement which specifically applies to a petro-chemical facility from an arbitration decision of Arbitrator Grimes, *Marathon Petroleum Company*, 89 L.A. 716, 722 [1987].

> "[Refineries have] the responsibility to the community, its owners and its employees to provide a safe work environment. Given the nature of the products handled in a refinery, particularly those in operations where the most volatile and hence more explosive gases and fluids are produced, an accident which can result from a seemingly insignificant misstep can produce a catastrophe."

There is no question but that Mr. Paull knew the Company's policy regarding being under the influence of

alcohol at the work place. The Company's Alcohol and Controlled Substance Guidelines [Exhibit No. E] states:

> "It is a policy of the Baytown Chemical Plant that the *use, possession, distribution, sale or being under the influence of alcohol or controlled substances on Company premises is absolutely prohibited and is cause for termination of employment.*"

Mr. Paull acknowledged receipt of these guidelines on February 3, 1983 [Joint Exhibit No. 2, D]. Mr. Paull also knew that positive test result for alcohol consumption could result in his termination. The Company's Alcohol and Drug Policy [Joint Exhibit No. 1] states:

> "A positive test result . . . is grounds for disciplinary action, including termination." [Joint Exhibit No. H]

The GC/MS test result showed that the grievants (*sic*) blood alcohol level was .043%. The parties have stipulated that a blood alcohol concentration of .04% or greater is considered a positive test for alcohol under the Company's policy. [Joint Stipulation No. 13]. Having a .043% blood alcohol level results in impairment of the individual. The standard adopted by the United States Coast Guard [14 C.F.R. Section 91.17(a), (ii)] demonstrates this:

> "(t)he consensus of scientific and professional opinion appears to be that material detrimental effects on human performance begin at least in the range of .04%."

Mr. Paull was scheduled to "slide" to the position of First-Line Supervisor in the CEA during the evening shift. These positions are the most critical positions in the Company's Chemical Plant. It is imperative that the employee's mental and physical facilities be completely

unimpaired due to alcohol in order to insure that no catastrophic event could occur. In the instant case, Mr. Paull advised Mr. Watts that he had consumed a few bottles of *non-alcoholic* beer prior to coming to work. The grievant maintained that position until December 1, 1992 when the Company learned of the positive test for alcohol. When the Company informed Mr. Paull of the test results, he admitted for the first time that he had consumed four (4) bottles of *regular* beer prior to reporting for work. Thus Mr. Paull not only had a blood alcohol level which was a violation of the Company's Alcohol and Drug Use Policy but he also lied to the Company Supervisors as to what he had consumed prior to coming to work.

In deciding the instant case, the Arbitrator is bound by the rationale mandated by the Court in *Gulf Coast Industrial Workers Union vs Exxon Company, U.S.A., Supra.* Judge Williams stated:

> "As stated above, Courts are the ultimate arbiters of public policy in the arbitration context. The case presents us with public policy favoring a safe and drug-free work place as expressed in countless governmental directives and judicial decisions. Mr. Woods was an employee who tested positive for cocaine while on the job, Woods had already taken advantage of his Company's Rehabilitation-Focused Treatment Program only to breach the after-care contract on two occasions (excusing his failure to report the relapse only because he felt "embarrased" by it), and who had refused to admit his drug use until the test results later came back positive. We conclude that compelled continued employment

> of Woods in a safety-sensitive position is sufficient to represent a plain violation of "well defined and dominant" public policy."

The conclusion of the Arbitrator is that Mr. Paull worked in an extremely hazardous industry. He occupied a highly sensitive safety position, being "slide" to a temporary Supervisor's position on November 22, 1992. He admitted to drinking three (3) beers and two (2) low alcohol beers between 12:00 and 15:00. He reported for work at approximately 18:00 [Joint Exhibit No. O – Memorandum of M.J. Agular (*sic*)]. The alcohol test showed a blood alcohol content of .043% which was considered a positive test result for alcohol. Mr. Paull has violated the Company's Alcohol and Drug Use Policy and the Alcohol Use Guidelines.

The Union argues that termination is too harsh a penalty in this case. The grievant had fourteen (14) years seniority with the Company and an excellent work record. He has received a number of citations by the Company for his good work performance. Three (3) months prior to his termination, he was issued a Letter of Appreciation for his excellent job performance during the Hurricane Shutdown and Start-up of the Chemicals Extraction Units on August 25 thru August 28, 1992. Union further contends that the Company did not follow its Positive Discipline Policy. It did not adhere to the progressive steps of that policy but instead terminated the grievant for his violation of the Alcohol and Drug Use Policy. That policy does not mandate termination on a first offense but permits the Company to consider and apply mitigating circumstance, which were certainly present in the instant case.

The argument that the Company violated the Positive Discipline Policy is without merit. That policy permits the Company, in a proper case, to terminate the employee. It reads:

> "Termination results when:
>
> The employee commits an offense so serious that Formal Levels of the Positive Discipline Process are not appropriate."

Reporting to work under the influence of alcohol as proved by the positive test result, must be viewed as an offense. The position of the Company is that once a violation of the Alcohol and Drug Use Policy and the Alcohol Use Guidelines has been proved, termination is the only remedy that the Arbitrator can order. The policy does not require termination on a first violation. There is an area of discretion and option granted to the Company as to what discipline to impose. This follows from the following language: "If an employee violates the provisions of the Employee Alcohol and Drug Use Policy, *appropriate* disciplinary action will be taken." [Emphasis added] Further the policy states: "A positive test result or refusal to submit to a drug or alcohol test is grounds for disciplinary action, including termination." Clearly this language does not order termination for a first offense.

The Courts have recognized that discharge does not necessarily follow where an employee is guilty of the violation of a Company policy. In *Capital Airways v. Airline Pilots Association*, 237 F.Supp. 373, 377 [Middle District, Tenn. 1963], the court ruled:

> "The decision of the Company to discharge an employee for misconduct, even if the employee

> is guilty, may or may not be for just cause. If the offense and the circumstances accompanying it are sufficient, such a penalty, just cause would exist, but it is also true that in many cases such a penalty may be excessive and unwarranted."

The Company has cited a number of past arbitration decisions between the same parties, which it maintains supports the penalty of termination in violations of the Alcohol and Drug Use Policy. In the *Lewis* case [Arbitrator Nicholas, July 9, 1991] the grievant denied his drug use in the face of overwhelming evidence. He had also completed a course of drug rehabilitation. Further, this employee was on a Decision Making Leave. This was an employee with twenty-one years of service. In the *Conley* case [Arbitrator Barron, February 7, 1992] the employee had gone through rehabilitation twice and was in the Company's After-care Program. He suffered two (2) relapses and failed to reveal the second relapse to the Company. The grievant had initially disclosed his addiction to the Company but did not disclose his relapse. In the *Fields* case [Arbitrator Fox, August 10, 1992] the Arbitrator noted at page 39 that the Company had an employee with a bad work record thru his seventeen (17) years of employment, had a bad safety record. He failed to come forward and disclose his cocaine use.

In the *Richards* case [Arbitrator Britton, April 2, 1993] the grievant was on a Decision Making Leave. He then violated his HAI contract, his After-care Agreement, the Alcohol and Drug Use Policy and the Company's working rules. In the instant case, Mr. Pope *(sic)* had no prior discipline for violation of the Company's Alcohol and Drug Use Policy and had a good work record.

The Arbitrator is impressed by the record of Mr. Paull and his tenure with the Company. He believes that Mr. Paull should be reinstated to full employment, but not in a safety-sensitive position. The ruling of *Georgia Power,* 707 F.Supp. at 536, N. 4, 538 to the effect that the Company would face extraordinary liability if, despite proven instances of deception regarding the Company's Drug Policy, the Company restored violators to their sensitive position. By reason of his violation of the Company's Alcohol and Drug Use Policy, the Arbitrator will not reinstate Mr. Paull to his former position or to any safety-sensitive position. The Company is ordered to find an equal position, but one that does not carry any safety-sensitive exposure. In this connection the following language from *Gulf Coast Industrial Workers Union vs. Exxon Company, U.S.A., Supra* is highly relevant:

> "Also, the Arbitrator ordered Woods be restored to his previous safety-sensitive position. Exxon was not allowed to consider placing him in a less dangerous assignment. AT *(sic) Misco,* the Supreme Court made reference to the provision of the award that permitted the Company to transfer the grievant to a different equivalent job, remarking that it was unclear that the worker "would pose a serious threat (to himself and others) and every job for which he were qualified." 484 U.S. at 45, 108 S.Ct. at 374. In the case before us, no such discretion exists: "Woods was ordered to be returned to his former position as a Process Technician."

AWARD

The Union grievance is sustained in part and denied in part. The grievant violated the Company's Alcohol and Drug Use Policy and its Alcohol and Controlled Substance Guidelines. Considering Mr. Paull's record and long tenure with the Company, termination is too harsh a penalty. The Company shall reinstate Mr. Paull to full employment and restore lost seniority. The Company is not required to pay Mr. Paull any back wages. The Company is ordered not to return Mr. Paull to his former position as a Process Technician. The Company shall assign Mr. Paull to an equivalent job which is not safety-sensitive.

/s/ John F. Caraway
IMPARTIAL ARBITRATOR

New Orleans, Louisiana
December 15, 1993

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

GULF COAST INDUSTRIAL WORKERS UNION	)	
V.	)	CIVIL ACTION G-94-69
EXXON CHEMICAL AMERICAS	)	

ORDER GRANTING AND DENYING
CROSS-MOTIONS FOR SUMMARY JUDGMENT

This is a review of an arbitration proceeding in which Russell Paull, an employee of Exxon Chemical Americas ("Exxon") was reinstated to his employment with Exxon after having been discharged by the Defendant for violating the Company's Alcohol and Drug Use Policy. Mr. Paull's union, Gulf Coast Industrial Workers ("GCIW") has brought suit to enforce the arbitrator's decision to reinstate Mr. Paull in a non-safety position. Exxon has filed a counterclaim to vacate the arbitration award on the grounds that the arbitrator exceeded his authority in reinstating Mr. Paull. Before the Court are cross-motions by both parties for summary judgment. The Defendant's motion is hereby **GRANTED**, and the Plaintiff's motion is **DENIED.**

Background

Mr. Paull was originally employed by Exxon on January 22, 1979 as a process technician at Exxon's Baytown Chemical Plant in Baytown, Texas. On November 22,

1992, Mr. Paull was scheduled to "slide" to the position of First-Line Supervisor in the Chemical Extraction Area of the plant.[1] The arbitrator determined that this is a critical position in the plant, and its duties are safety-sensitive (Arb. Award, at 7). Violation of the appropriate safety standards could result in loss of life and serious damage to the local environment and property. Id.

When Mr. Paull arrived to work at 6:00 P.M. of *(sic)* November 22, 1992 to relieve Mr. Watts, the latter smelled alcohol on Mr. Paull's breath and told him that under the company's Alcohol and Drug Use Policy there was reasonable cause for an alcohol test. Despite Mr. Paull's objection that he had only drunk several bottles of non-alcoholic beer, Mr. Watts and a Union representative accompanied Mr. Paull to the San Jacinto Hospital, where a blood test consisting of a gas chromatography/mass spectroscopy was taken. Mr. Paull was placed on suspension pending the outcome of the blood test.

On December 1, 1992, Exxon learned that the test results showed that Mr. Paull had a blood alcohol level of .043% at the time of the incident, somewhat above the .040% level all parties have stipulated to as the company's threshold for testing positive for alcohol. On learning of the test results, Mr. Paull admitted that he had actually drunk four bottles of regular beer before reporting to work on November 22. Mr. Paull was discharged

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[1] "Sliding" is a process whereby a non-supervisory hourly employee assumes supervisory responsibilities on a temporary basis.

on December 1, 1992 for violating Exxon's alcohol and Drug Use Policy[2] and Alcohol Use Guidelines.[3]

All parties agree that relations between Exxon, its employees, and GCIW are controlled by the Collective Bargaining Agreement (the "CBA") that became effective on April 15, 1991. Pursuant to that agreement, the Union notified Exxon of its intent to arbitrate Mr. Paull's discharge, and a hearing of the grievance was heard on July 27, 1993 before Arbitrator John F. Caraway in Baytown, Texas. The sole question before the arbitrator was, "Did the Company have just cause to discharge Mr. Paull effective December 1, 1992 for violation of the Company's Alcohol and Drug use Policy? If not, what is the appropriate remedy. *(sic)*" (Arb. Award, at 5). On December 15, 1993, Mr. Caraway ruled that Mr. Paull worked in a

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[2] Exxon's Alcohol and Drug Use Policy states:

> Exxon may conduct unannounced searches for drugs and alcohol on owned and controlled property. The corporation may also require employees to submit a medical examination or alcohol and drug testing [sic] where cause exist [sic] to suspect alcohol or drug use . . . A positive test result or refusal to submit to a drug or alcohol test is grounds for disciplinary action, including termination.

(Defendant's Brief in Support of Summary Judgment, at 8).

[3] The Baytown Chemical Plant's Alcohol and Controlled Substance Guidelines state:

> The Company has the right to require employees to submit to medical evaluation or alcohol and drug testing where reasonable cause exists to suspect alcohol or controlled substance misuse. A positive test result or refusal to submit to testing is grounds for disciplinary action, including termination of employment.

highly safety-sensitive position in the plant and that he had both violated Exxon's Alcohol and Drug Use Policy and lied to his supervisors about his behavior. Nevertheless, the arbitrator determined that Exxon's policy does not mandate automatic termination for a first offense and that in light of Mr. Paull's excellent work record[4], he should be reinstated by Exxon to a non-safety position. Both Exxon and GCIW subsequently filed their respective suits to have this Court review the arbitrator's award.

Standard of Review and Analysis

Summary judgment is appropriate only when no issues of material fact exist, and the movant is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); *Walker v. Sears Roebuck*, 853 F.2d 355, 358-59 (5th Cir. 1988). A court must draw all reasonable inferences of fact in favor of the party opposing the motion. *Walker, supra*, 853 F.2d at 358. In this case, both parties have stipulated to all material facts, and the only question before this Court is a purely legal one: Did the arbitrator exceed his authority in reinstating Mr. Paull to a non-safety position at Exxon?

In reaching its decision in this matter, the Court is aware of its limited power to review an arbitration award. District courts have jurisdiction to review an arbitration proceeding pursuant to 29 U.S.C. Section 185. Such review, however, is highly limited in its scope. An

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[4] Evidence before the arbitrator established that Mr. Paull had worked for Exxon for fourteen years and that he had received a number of citations by the company for good work performance.

arbitrator's award will not be disturbed if the decision "draws its essence from the collective bargaining agreement" and is not based on the arbitrator's "own brand of industrial justice." *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597, 80 S.Ct. 1358, 1361, 4 L.Ed.2d 1424 (1960). It is well established that a reviewing court may not reconsider the merits of a case, even if the parties involved allege that the decision rests on an incorrect version of the facts:

> The courts . . . have no business weighing the merits of the grievance, considering whether there is equity in a particular claim, or determining whether there is particular language in a written instrument which will support the claim.

United Paperworkers International Union, AFL-CIO v. Misco, Inc., 484 U.S. 29, 36, 108 S.Ct. 364, 369, 98 L.Ed.2d 286 (1987) (quoting *United Steelworkers, supra*, at 568). As long as the arbitrator has acted within the scope of his authority and is "even arguably construing or applying the contract," a Court may not reject an arbitrator's interpretation of a contract, even if the Court is convinced that a serious error had been committed. *Id.* at 38.

Courts are free, however, "to scrutinize the award to ensure that the arbitrator acted in conformity with the jurisdictional prerequisites of the collective bargaining agreement." *Delta Queen Steamboat Co. v. District 2 Marine Engineers Beneficial Ass'n*, 889 F.2d 599, 602 (5th Cir. 1989), *cert. denied*, 498 U.S. 853, 111 S.Ct. 148, 112 L.Ed.2d 114 (1990). In particular, an arbitrator may not ignore the plain language of a collective bargaining agreement, *Interstate Brands Corp., Butternut Bread Div. v. Chauffeurs,*

Teamsters, Warehousemen and Helpers Local Union No. 135, 909 F.2d 885, 889 (6th Cir. 1990), *cert. denied*, 499 U.S. 905, 111 S.Ct. 1104, 113 L.Ed.2d 214 (1991), and in the rare case in which an arbitrator has ignored such plain language, a reviewing court may vacate an award.

This Court believes that it has been presented here with just such a case. Article 15 of the CBA governs the authority of the arbitrator, specifically stating that the arbitrator "shall have the authority only to interpret and apply the provisions of this Agreement and *shall not have authority to alter or add to it in any way.*" (CBA Art. 15, at 16) (emphasis added). Article 26 of the CBA specifically confers on Exxon the exclusive right to discharge employees for "just cause." (CBA Art. 26, at 21). Finally, Schedule C of the CBA provides that an employee may be discharged without notice for the "[i]ntroduction, possession, or use of intoxicating liquors on the property of the Company, or proceeding to work under the influence of liquor." (CBA, Schedule C, at 58).

The Plaintiff has argued that Exxon's Alcohol and Drug Use Policy provides for a range of disciplinary measures (Plaintiff's Reply Brief, Instrument #14, at 3) and that the arbitrator acted within his authority when he determined that reinstatement was proper because the policy did not *mandate* discharge for a first offense. (Arb. Award, at 17). Were this *all* that the CBA says, this Court might be inclined to agree with the Plaintiff, readily conceding that discharge after fourteen years of loyal service is a draconian penalty. The Court is highly sensitive to the fact that an arbitrator is fully allowed to bring his own judgment to bear in reaching a fair solution and that "this is especially true when it comes to formulating

remedies." *Delta Queen, supra,* 889 F.2d at 41 (emphasis omitted). Indeed, a long (and somewhat varied) line of cases has allowed arbitrators to interpret clauses providing for the immediate discharge of an employee who commits certain acts as, in fact, allowing their reinstatement.

Thus, an employee who was found drinking on the job was reinstated to his position even though the governing Collective Bargaining Agreement between the employer and union clearly provided for immediate discharge when an employee was discovered drinking. *Super Tire Engineering Co. v. Teamsters Local Union No. 676,* 721 F.2d 121, *(sic)* (3rd Cir.), *cert. denied,* 496 U.S. 817, 105 S.Ct. 83, 83 L.Ed.2d 31 (1984). The Third Circuit declared that the arbitrator was free to read the "immediate discharge" clause in light of a preceding clause that provided for discussions between management and the union before a discharge could occur. Specifically, the "immediate discharge" clause failed to equate drinking with "just cause":

> Thus, the arbitrator might have found that all discharges are subject to the "just cause" provision . . . and that consequently the contract authorized him to apply all the surrounding facts and circumstances to his interpretation of the contract to determine whether or not the discharge is proper.

Id. at 124. The Court found that, in the absence of an unambiguous provision in the contract, "just cause" comprises a "mix of factors" that the arbitrator was free to determine in his best judgment. *Id.* at 125.

No such ambiguity exists in the present case. Article 26 of the CBA states that Exxon "shall have the right to discipline and discharge employees for *just cause. The commission of the offense listed in Schedule C shall be just case* to render an employee liable to discharge on first offense." (CBA Art. 26, at 21) (emphasis added). As stated above, Schedule C specifically lists "proceeding to work under the influence of liquor" as a dischargeable offense. (CBA Art. 26, *(sic)* at 58). Thus, by its very terms, the CBA defines what "just cause" is and gives Exxon the Authority to discharge an employee for committing one of the Schedule C offenses under the "just cause" banner. Even under the most expansive theory of semantics, no interpretation of this language is required; it is plain and unambiguous on its face.

This is not, therefore, a case in which an arbitrator is called upon to interpret a contract, a power explicitly granted to him under the CBA.[5] Likewise, it is not a case in which the arbitrator is called on to give meaning to the words of a contract. *Misco, supra,* 484 U.S. at 41. Rather, it is one in which "the arbitrator [has] ignore[d] the plain language of the contract" and created a remedy that "simply reflect[s] the arbitrator's own notions of industrial justice." *Id.* In the face of the contract's unambiguous definition of "just cause" and the equally plain inclusion of the Schedule C offenses, it cannot be said that the arbitrator even "arguably construe[d] or appl[ied] the

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[5] Article 15 of the CBA states that the arbitrator "shall have the authority only to interpret and apply the provisions of this Agreement and *shall not have authority to alter or add to it in any way.*" (CBA, Art. 15, at 16).

contract." *Id.* In answering the question presented to him ("Did the Company have just cause to discharge Mr. Paull . . . ?) the arbitrator need only have looked at the explicit language of Article 26 of the CBA to have found the immediate answer: yes. Thus, when the arbitrator found that Mr. Paull violated Exxon's Alcohol and Drug Use Policy and the Alcohol Use Guidelines – that Mr. Paull, that is, violated an offense under the Section *(sic)* C of the CBA – the arbitrator had no authority to alter Exxon's right to discharge its employee immediately, even though what he tried to achieve was, frankly, a more "just" result.

In saying this, the Court does not rule on any finding of fact by the arbitrator or contest the interpretation he made of the Alcohol and Drug Use Policy. This Court simply points to the plain language of the agreement that had been *pre-determined* through negotiations between GCIW and Exxon. When an employee is a member of Union which submits to a collective bargaining agreement, the agreement defines the rights and rules that govern relations between the parties, and an arbitrator may not make additions to those negotiated rules. *Exxon Corp. v. Exxon Employees' Federation of Texas,* CA 3:93-CV-2233-R (N.D.Tex. July 27, 1994), at 8. As the First Circuit has written concerning a similar violation of a collective bargaining agreement:

> Here . . . the company and the union negotiated and incorporated into the collective bargaining agreement the disciplinary rules and the resulting penalties for violations of these rules. Nothing is left to the arbitrator's judgment except determining whether the rules are violated. . . .

> It is not a question of a strained interpretation by the arbitrator with which we might agree or disagree, but rather a reading of the plain language of the contract which removes from the arbitrator the authority to determine a remedy once [he] concludes that a certain rule has been breached.

S.D. Warren Co. v. United Paperworkers' Int'l, 845 F.2d 3, 8 (1st Cir.), *cert. denied*, 488 U.S. 992, 109 S.Ct. 555, 102 L.Ed.2d 582 (1988).

The Fifth Circuit has been very clear that trial courts are free to examine arbitration awards to ensure that the arbitrator acted in conformity with the jurisdictional prerequisites of a collective bargaining agreement and may vacate an award that exceeds contractual authority. *Container Prods. v. United Steelworkers of Am.*, 873 F.2d 818, 820 (5th Cir. 1989). "[T]he rule in this circuit, and the emerging trend among other courts of appeals, is that arbitral action contrary to express contractual provisions will not be respected." *Delta Queen, supra*, 889 F.2d at 604. Accordingly, when the arbitrator in this case ignored the plain-language definition of what constituted "just cause" for hiring *(sic)* in answering the question before him, he exceeded his jurisdictional authority under the collective bargaining agreement. His ruling was, therefore, an *ultra vires* act which this court now vacates.[6]

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[6] Much of the difficulty posed by this case seems to stem from the fact that Exxon failed to raise the binding nature of the CBA to the arbitrator in a clear-cut fashion. In its brief to the arbitrator, Exxon merely stated that "the Company need not establish that discharge is an appropriate penalty since that is already settled by the Collective Bargaining Agreement. . . ."

Exxon also argues as a second ground for decision that the arbitrator's award should be vacated because, despite the fact that the arbitrator failed to state whether he did nor did not find "just cause" for Mr. Paull's discharge, a proper reading of the arbitrator's award shows that he *implicitly* found just cause for termination. Consequently, Exxon argues, the arbitrator had no authority to fashion his own remedy once the first half of the question submitted to him ("Did the Company have just cause to discharge Mr. Paull . . . ") was implicitly answered in the affirmative. This Court agrees with Exxon's contention.

The Fifth Circuit has clearly held on several occasions that an arbitrator's award need not explicitly state than an employer had just cause to discharge an employee when the arbitration decision as a whole implicitly finds that just cause was present. The phrase "just cause"

> carries no talismanic significance in labor jurisprudence. It is simply a term of art that defines

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Defendant's Brief in Support of Summary Judgment, Instrument #12, Section 1, at 24. Thus, it was never clearly argued to the arbitrator that the CBA defines what "just cause" is, and the arbitrator's decision seems to have rested almost solely on the Alcohol and Drug Use Policy and the Alcohol Use Guidelines.

Nevertheless, neither party in this case contends that the CBA is not the controlling document that defines the arbitrator's authority. Both parties have submitted copies of the CBA to this Court, and it is clear that both Plaintiff and Defendant assume that the CBA defines the scope of the parties' rights. See Plaintiff's Memorandum in Support of Summary Judgment, Instrument #10, at 3-7, 9-16; Defendant's Reply to Plaintiff's Motion for Summary Judgment, Instrument #15.

> the many unrelated, independent acts that serve as grounds for employee discipline under the [collective bargaining] agreement. If a collective bargaining agreement defines "proper cause" to include a nonexhaustive list of offenses, an arbitrator cannot ignore the natural consequence of his finding that a listed offense was committed.

Delta Queen, supra, 889 F.2d at 604-05. In *Delta Queen,* for example, the binding collective bargaining agreement provided that a merchant-marine officer could be discharged only for "proper cause such as . . . carelessness." *Id.* at 601. The arbitrator found that a ship's Captain had been "grossly careless" but failed to specifically mention that the employer had just cause to discharge him. Consequently, the arbitrator reinstated the Captain to his position in light of his excellent work history. *Id.* The Fifth Circuit upheld the District Court's vacatur of the arbitration award, stating that when the arbitrator found that an employee had committed an offense specifically named in the collective bargaining agreement, just cause is implicitly present, and the arbitrator has no authority to fashion his own remedy.[7]

These are precisely the facts in the instant case. The arbitrator found that Mr. Paull had a blood alcohol level

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[7] "Thus, where an arbitrator fails to make an express finding of proper cause, he nevertheless will be so bound if he finds that the employee committed certain underlying acts that constitute proper cause under the collective bargaining agreement." *Id.* at 604. For further examples of the same legal conclusion based on highly similar facts, see *Container Prods., Inc. v. United Steelworkers of Am.,* 873 F.2d 818, 820 (5th Cir. 1989); *E.I. DuPont de Nemours and Co. v. Local 900 of the Int'l Chemical Workers Union,* 968 F.2d 456 (5th Cir. 1992).

higher than the .04% level defined as a positive test for alcohol by Exxon's policy and that Mr. Paull violated the Alcohol and Drug Use Policy. (Arb. Award, at 13-14). As stated above, Article 26 and Section (*sic*) C of the CBA explicitly state that "proceeding to work under the influence of liquor" is "just cause" for immediate dismissal. Thus, having found that Mr. Paull arrived at work with a positive level of blood alcohol, the arbitrator implicitly found that Exxon had just cause for terminating Mr. Paull's employment. Under the question presented to him, therefore, the arbitrator had no authority to fashion his own remedy once he affirmatively answered the first sentence as to just cause. *See E.I. DuPont de Nemours, supra,* 968 F.2d at 459 (stating that once that arbitrator implicitly finds just cause under a similar arbitration question, he is without further remedial authority). The Court thus finds that the arbitrator exceeded his authority in reinstating Mr. Paull to his employment with Exxon because, having decided that Mr. Paull violated an offense listed in Schedule C of the CBA, the arbitrator had no authority to fashion his own remedy.

Finally, the parties in this case vigorously debate the question of whether the arbitrator's decision to reinstate Mr. Paull violates a public policy mandating that employers provide a drug and alcohol-free workplace. Having decided this case on other grounds, the Court does not reach this issue. It should be pointed out, however, that the Defendant's reliance on *Gulf Coast Industrial Workers Union v. Exxon, Co., U.S.A.*, 991 F.2d 244 (5th Cir.), *cert. denied,* 114 S.Ct. 441, 126 L.Ed.2d 375 (1993) is misplaced in this regard. In that case, the Circuit held that an arbitrator's decision to reinstate an employee who had

tested positive for cocaine to his job as a process technician – the same job formerly held by Mr. Paull – violated public policy. Nevertheless, the facts of *Gulf Coast Industrial* are easily distinguished from the present case. The employee in that case had an ongoing addiction to cocaine; he had been through rehabilitation; he had actively tried to conceal his relapse into drug use; and, importantly, he was reinstated to a safety-sensitive position. The Circuit found these facts to be "of the utmost importance" in finding that the employee's reinstatement violated public policy. *Id.* at 254. By contrast, there is no evidence that Mr. Paull's intoxication was anything more than an isolated incident, and he was reinstated to a non-safety position. If the Court is presented with a violation of public policy in this case, more complete argument on how Mr. Paull's reinstatement to a non-safety position violates such a policy is required. Moreover, the Plaintiff is encouraged to address this problem in the proper context of collective bargaining when that is next available.

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For the reasons stated above, the Defendant's Motion for Summary Judgment is **GRANTED,** the Plaintiff's Motion for Summary Judgment is **DENIED,** and the arbitrator's award is **VACATED.** Furthermore, all other relief not specifically granted herein is **DENIED.** It is further **ORDERED** that the parties file no further pleadings on this issue in this Court, including motions to reconsider and the like. Instead, the parties are instructed to seek any further relief to which they feel themselves entitled

in the United States Court of Appeals for the Fifth Circuit, as may be appropriate in due course.

IT IS SO ORDERED.

Done this 20th day of September, 1994, at Galveston, Texas.

/s/ SAMUEL B. KENT
UNITED STATES
DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

GULF COAST INDUSTRIAL WORKERS	)	CIVIL ACTION
V.	)	NO. G-94-069
EXXON CHEMICAL AMERICAS	)	

FINAL JUDGMENT

For the reasons stated in the Court's Order entered this date, the above-captioned action is hereby **DISMISSED WITH PREJUDICE.** Each party shall bear his or its own taxable costs and expenses incurred herein to date.

THIS IS A FINAL JUDGMENT.

IT IS SO ORDERED.

DONE at Galveston, Texas this 20th day of September, 1994.

/s/ SAMUEL B. KENT
UNITED STATES
DISTRICT JUDGE